CENTRAL MALAYSIAN FINANCE BHD.

v.

GREAT PACIFIC DEVELOPMENT SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
WAN HAMZAH J
[ORIGINATING SUMMONS NO. F 710 OF 1981]
13 OCTOBER 1982

LAND LAW: *Application for order of sale of land charged - Part of land acquired by government - Whether order of sale for whole land possible - Notice in Form 16E - Whether valid - Effect of other defects - Whether fatal.*

The plaintiff applied for an order of sale of the whole of the land charged to it by the defendant, though part of the land had since the charge been acquired by the government. The notice served on the defendant was in Form 16E. The notice included a demand for payment of interest. The notice had certain defects regarding the description of the charge and the amount demanded as principal.

Held:

[1] An order for sale could not be made for the whole of the land charged since part of the land since the charge had been acquired by the Government.

[2] The notice in Form 16E would have been valid as the interest included in the notice was also payable on demand.

[3] However, the notice was invalid, as it contained certain defects which were fatal to it. The charge was wrongly described in the schedule. Furthermore, the amount claimed as the principal sum secured by the charge was incorrectly stated.

[Application dismissed]

Cases referred to:
V.A.M. Hussian v. BP Malaysia Sdn. Bhd. [1970] 2 MLJ 69
Mary Michael v. United Malayan Banking Corporation Bhd. [1971] 1 MLJ 172

Legislation referred to:
Civil Law Ordinance 1956, s. 11
National Land Code 1965, s. 254

For the plaintiff/chargee - Anthony Dason; M/s. Dason & Co.
For the defendant/chargor - Laurence Teoh; M/s. C.H. Liew & Co.

JUDGMENT

Wan Hamzah J:

In 1975 the defendant charged its land lot No. 16, s. 59, Kuala Lumpur Town, held under C.T. 1043, to the plaintiff. The land was 1.99 acres in area. In 1979 the Government acquired 24,776 square feet of the land. By this summons the plaintiff applies for an order of sale of the land lot No. 16 for recovery of amounts outstanding under the charge.

In view of the acquisition of part of the land by the Government, the lot No. 16 must have been subdivided and surveyed to identify that part which was acquired by the Government. New lot numbers must have been assigned to the part of the land which was acquired and to the remaining part of it. The plaintiff has not given the new lot numbers but instead applies

for an order of sale of the whole of lot No. 16. It would not be proper to make an order of sale of the whole of lot No. 16 since part of it has been acquired by the Government. In an order of sale the land ordered to be sold has to be accurately identified, and this can be done by referring to the lot number of the land to be sold. Alternatively the plaintiff should have obtained from the Land Office the subdivision plan of the Lot No. 16, showing the demarcation of the portion acquired by the Government and the part not acquired. Order of sale could then be made of the part not acquired, by reference to the subdivision plan. Under the present circumstances it is not possible to make an order for sale.

The defendant has also opposed this application on other grounds. It was submitted that the plaintiff had wrongly served notice in Form 16E, whereas Form 16D is the correct notice which should have been served. It was submitted that the notice in Form 16E was rendered invalid by the inclusion of interest in the demand. In my opinion there can be cases where inclusion of interest does not necessarily render the notice in Form 16E invalid. One example is the Federal Court case of *V.A.M. Hussian v. BP Malaysia Sdn. Bhd.* [1970] 2 MLJ 69, in which foreclosure proceedings were taken to recover the principal sum of RM45,000 which under the terms of the charge was payable on demand without interest. A notice in Form 16E was served on the chargor and in it was included a demand for payment of interest. In his judgment in that case Suffian FJ (as he then was) stated:

> Further it is said that Form 16E is only for demanding the repayment of principal only and the inclusion of interest on it was a substantial variation that made the notice defective. I do not think that the inclusion of interest made the notice defective.

The Federal Court upheld the award of interest under s. 11 of the Civil Law Ordinance 1956.

In my opinion the question whether the inclusion of interest in Form 16E renders it invalid or not and the question as to which of the forms should be used depend on the terms relating to the interest contained in the agreement of charge. If it is provided that interest is to be paid by a certain time and the chargor has defaulted in the payment, Form 16E cannot be used in respect of such interest because s. 254 of the National Land Code requires that the chargor should first be asked by means of notice in Form 16D to remedy the breach within the appropriate time. If the agreement provides simply that the interest is payable on demand and the principal sum is also payable on demand, in my opinion it is open to the chargee to serve notice in Form 16E, provided that the amount of the principal sum due and the amount of interest due are separately and accurately stated. In such case there is no breach to the remedied. In the present case the terms relating to interest are contained in Clauses 1 and 5 of the agreement annexed to the memorandum of charge. The relevant parts of clauses are reproduced below-

1. The Chargor(s) will on demand pay to the Chargee

(a) the said sum of Dollars Three Million seven hundred thousand (RM3,700,000 (herein after referred to as "the Loan") together with interest thereon (as well after as before any Court order or judgment) at the rate of twelve and a half per centum (12½%) per annum (hereinafter referred to as "the Interest Rate") AND until demand as aforesaid the Chargor(s) shall repay the Loan in the following manner:

(i) to repay the Loan with interest thereon at the Interest Rate by eight (8) quarterly instalments (hereinafter referred to as "the Instalments") the first of the Instalments to be paid on the 1st day of the thirty-ninth (39th) month following next after the date on which the full amount of the Loan shall have been advanced or paid to or on behalf or for the benefit of the Chargor(s) (or on such other date as the Chargee may stipulate) and the subsequent Instalments to be paid at regular successive intervals of three (3) months until the full amount of the Loan and all interest thereon shall have been fully paid and satisfied;

(ii) until payment of such stated in (i) above the Chargor(s) shall pay interest on the Loan at the Interest Rate on the first day of every month the first of such payment to be made on the first day of the month following the date of the release of the Loan.

5. In the event that the Chargor(s) (or where the Chargor(s) shall be more than one person if any one of them) shall:

(a) make default in payment of any one or more of the Instalments or any interest thereon or other sums or moneys (whether principal or interest) herein agreed or covenanted by the Chargor(s) to be paid,

then and in any of such cases the Loan and any interest thereon and all other sums of moneys (whether principal or interest) for the time being owing under this Charge shall immediately become payable by the Chargor(s) to the Chargee and the Chargee shall forthwith become entitled to recover the same with interest thereon at the Interest Rate and to exercise the rights and powers upon default herein this Charge and by law provided without any previous notice to or concurrence on the part of the Chargor(s).

Since the agreement not only provides that the principal sum with interest is payable on demand but also that before demand is made the defendant should pay the principal sum with interest by instalments at certain times, in my opinion the plaintiff would have the choice either to serve notice in Form 16D if the chargor had defaulted in the payment of any instalment, or to serve notice in Form 16E on the basis that the principal sum with interest is payable on demand irrespective of whether there had been default in the payment of any instalment or not. In fact the plaintiff served a notice in Form 16E, and this notice would have been valid had it not been for the following defects. The notice refers to "the charge described in the schedule below" but in the schedule in the column "Registered No. of charge (if any)" the word "tiada" is entered, whereas the correct description "Charge Presentation No. 1220A, Jilid 19 Folio 112A" should have been entered in the column. It is stated in the notice that the principal sum secured by the charge amounted to RM5,869,207.01, as at 31 May 1981, whereas the correct maximum amount of principal sum should not exceed RM3,700,000, and the balance of the amount alleged to be due must have been interest. In my opinion the defects are fatal, and this is another reason why this application should be dismissed.

I am mindful of the following passage in the judgment of Gill FJ (as he then was) in the case of *Mary Michael v. United Malayan Banking Corporation Bhd.* [1971] 1 MLJ 172:

> Had the chargee in the present case issued a notice in Form 16E, the chargor could perhaps have successfully argued that the form was inapplicable on the ground that the chargee was also including in the notice the amount of the interest due on the charge. It is to be observed that neither in s. 255(1) of the Code nor in the form itself is there any mention of interest, so that if the chargee were to include it in the notice, the question would then arise as to whether this could be done under the provisions of s. 62 of the Interpretation Act, 1967 on the ground that such deviation from the form has no substantial effect and is not calculated to mislead. This, however, is a question which does not fall to be decided in the present case, because the chargee here chose to issue a notice in Form 16D which, as the learned Lord President has pointed out, he was entitled to do.
>
> Should this question come up for decision in the future, speaking for myself, I would say that it is open to a chargee to issue a notice in Form 16E in respect of the principal sum. If that sum is not paid in compliance with the notice and an order for the sale of the land is made on that ground, the Court would have the power to order that any interest due on the principal sum be paid out of the proceeds of sale. Indeed s. 257(1)(c) requires the Court to specify the total amount due to the chargee at the date on which the order for sale is made.

> Of course, if the chargor pays the amount of the principal sum stipulated in Form 16E, the chargee will have to issue a further notice for the recovery of interest, in which event only a notice in Form 16D would appear to be appropriate.

When Gill FJ stated that if the chargor pays the amount of the principal sum stipulated in Form 16E, the chargee will have to issue a further notice in Form 16D for the recovery of interest, his mind was directed to the fact of the case before him, i.e. the fact that in that case there was default in the payment of interest. Nothing in the report shows that interest was payable on demand. I do not think that the Judge meant to lay down the rule so as to apply also to a case where interest is payable on demand.

The application is dismissed. Liberty is given to the plaintiff to submit a fresh and proper application.

Also found at [1983] 1 CLJ 134